

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JACK E. ALLEN, :  
Petitioner, :  
v. : Civil Action No. 04-225J  
GEORGE PATRICK, SUPERINTENDENT, :  
S.C.I. HOUTZDALE, :  
Respondent :

MEMORANDUM ORDER

This matter was referred to Magistrate Judge Keith A. Pesto for a Report and Recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and subsections 3 and 4 of Local Rule 72.1 for Magistrate Judges.

The Magistrate Judge filed a Report and Recommendation on July 24, 2006, docket no. 13, recommending that the petition, which sought a number of remedies for the lengthy delay in affording petitioner a direct appeal from his conviction for murder in 1996, be denied as moot. The basis for the recommendation was the reinstatement of the petitioner's direct appeal rights by the Court of Common Pleas of Clearfield County, and the issuance of an opinion on January 18, 2006, by the Pennsylvania Superior Court. The Pennsylvania Superior Court in effect ordered that petitioner receive a new trial: that is greater relief than the excusing of exhaustion and reinstatement of his direct appeal petitioner sought in his federal petition. The Pennsylvania Superior Court left open the possibility that the Commonwealth could argue in the trial court that petitioner should not receive a new trial because the Commonwealth has been prejudiced in its ability to retry the

petitioner. The Commonwealth filed a petition for allowance of appeal in the Pennsylvania Supreme Court, which remains pending.

The Magistrate Judge's further recommendation was that the petition should be reopened, as no longer moot, if the Pennsylvania Supreme Court reversed the grant of a new trial or there was inordinate delay in ruling on the petition for allowance of appeal, because that would delay petitioner's new trial.

The parties were notified that pursuant to 28 U.S.C. § 636(b)(1), they had ten days to serve and file written objections to the Report and Recommendation. Petitioner filed timely objections, docket no. 15, but the objections are meritless. Petitioner, in addition to repeating reasons why the delay in his direct appeal was improper, seeks a change of venue for his retrial and asserts defenses to the charge of murder that: 1) he did not murder his wife, she died due to medical malpractice, and 2) his wife is still alive. docket no. 15, Objections at 6. Those motions and defenses, if they are to be presented, must be presented initially in the Court of Common Pleas of Clearfield County, before or at petitioner's new trial.

After de novo review of the record of this matter, together with the Report and Recommendation and the timely objections thereto, the following order is entered:

AND NOW, this 9<sup>th</sup> day of August, 2006, it is

ORDERED that the petitioner's petition for a writ of habeas corpus is denied as moot. A certificate of appealability is denied. The Report and Recommendation is adopted as the opinion of the Court. Counsel for the respondent is directed to keep the Court informed of any change in the status of the proceedings in the state courts, by letter addressed to the Clerk. The federal petition will be reinstated and counsel appointed for purpose of amending the petition if the Pennsylvania Supreme Court reverses the Pennsylvania Superior Court's order or petitioner's new trial does not commence by January 18, 2007 (one year from the decision of the Pennsylvania Superior Court). The Clerk shall mark this matter closed.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Kim R. Gibson', written over a horizontal line.

KIM R. GIBSON,  
UNITED STATES DISTRICT JUDGE

Notice to:

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